

NO. 62064-9-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON,

Respondent,

v.

IVARS EMMERMANIS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Kimberley Prochnau, Judge

BRIEF OF APPELLANT

ERIC J. NIELSEN
Attorney for Appellant

NIELSEN, BROMAN & KOCH, PLLC
1908 East Madison
Seattle, WA 98122
(206) 623-2373

TABLE OF CONTENTS

	Page
A. <u>ASSIGNMENT OF ERROR</u>	1
<u>Issue Pertaining to Assignment of Error</u>	1
B. <u>STATEMENT OF THE CASE</u>	1
C. <u>ARGUMENT</u>	4
THE COURT'S DECISION TO REVOKE EMMERMANIS' SSOSA WAS AN ABUSE OF DISCRETION.	4
D. <u>CONCLUSION</u>	6

TABLE OF AUTHORITIES

	Page
<u>WASHINGTON CASES</u>	
<u>State ex re. Carroll v. Junker,</u> 79 Wn.2d 12, 482 P.2d 775 (1971)	5
<u>State v. Blackwell,</u> 120 Wn.2d 822, 845 P.2d 1017 (1993)	4
<u>State v. Dahl,</u> 139 Wn.2d 678, 990 P.2d 396 (1999)	4
<u>State v. Kuhn,</u> 81 Wn.2d 648, 503 P.2d 1061 (1972)	4
<u>State v. Lewis,</u> 115 Wn.2d 294, 797 P.2d 1141 (1990)	5
<u>State v. Rohrich,</u> 149 Wn.2d 647, 71 P.3d 638 (2003)	5
<u>State v. Rundquist,</u> 79 Wn. App. 786, 905 P.2d 922 (1995)	5
<u>RULES, STATUTES AND OTHERS</u>	
RCW 9.94A.670(10)	4

A. ASSIGNMENT OF ERROR

The court erred in revoking appellant's Special Sex Offender Sentencing Alternative (SSOSA).

Issue Pertaining to Assignment of Error

Did the trial court abuse of discretion when it revoked appellant's SSOSA sentence on the grounds appellant failed to make reasonable progress in direct contradiction to the testimony of the treatment provider?

B. STATEMENT OF THE CASE¹

On December 12, 2002, Ivars Emmermanis pleaded guilty to two counts of rape of a child in the first degree. CP 8-29. On January 24, 2003, he was sentenced under the special sex offender sentencing alternative (SSOSA) to a sentence of 131 months on count I, to be served concurrently with a sentence of 131 months on count II. 1RP 18, CP 38-64. Emmermanis was ordered to serve 180 days with the rest of the sentence suspended. Id.

The judgment and sentence, Appendix H, lists the following pertinent conditions:

4. Within 30 days of being placed on supervision, enter into and make reasonable progress in sexual deviancy therapy, with a therapist approved by your Community Corrections Officer, which therapy may include the treatment tools of polygraph and plethysmograph testing.

10. Do not possess or peruse pornographic materials unless given prior approval by your sexual deviancy treatment specialist and/or Community Corrections Officer. Pornographic materials are to be defined by the therapist and/or Community Corrections Officer.

¹ The verbatim report of proceedings for January 24, 2003 is referred to as 1RP; August 29, 2006 is referred to as 2RP; February 7, 2008 is referred to as 3RP; July 16, 2008 is referred to as 4RP.

CP 38-64. Emmermanis enrolled in sexual deviancy treatment at Bellevue Community Services under the supervision of Dr. Bill Lennon. 2RP 3.

On August 29, 2006, Emmermanis admitted violating his sentence by possessing pornography and failing to make reasonable progress in treatment. 2RP 4. He was ordered to serve 33 days in custody and comply with treatment and supervision conditions; treatment was extended to August 29, 2007. 2RP 8-10; CP 56. On August 9, 2007, treatment was extended to February 6, 2008. CP 68.

On December 6, 2007, Emmermanis submitted to a polygraph test. 3RP 3. Deception was detected regarding possession or use of pornography and viewing images of anyone under the age of eighteen for sexual purposes. 3RP 3. Department of Corrections did a search of Emmermanis's home and found a number of items of a sexually explicit nature. 3RP 3-4. Emmermanis was arrested on December 14, 2007. 3RP 6. On January 4, 2008, Department of Corrections alleged two violations of the conditions of supervision: 1) possessing pornography on or about December 14, 2007, and 2) Failing to make reasonable progress in treatment since the date of sentencing.

On February 7, 2008, a review hearing was held and Emmermanis again admitted to violating his sentence by possessing pornography and failing to make reasonable progress in treatment. 3RP 5. He was ordered to serve 65 days in custody and return for a review hearing; treatment was extended to February 9, 2009. 3RP 19-21; CP 70-71.

On July 16, 2008, a review hearing was held. The Department of Corrections alleged one violation of the conditions of supervision: "[f]ailing

to make reasonable progress in treatment since being released from jail on or about 2-7-08." 4RP 40, 45; CP 74-75.

At the hearing, Dr. Lennon, testified that "since February, 2008, [Emmermanis] . . . has made more than reasonable progress." 4RP 17. Further, Dr. Lennon added in response to a question of whether the treatment was taking too long: "If I hadn't seen the changes that happened in the most recent time, what I perceived as very positive changes, we would have said that, this last go-round." 4RP 26. The Court nevertheless revoked Emmermanis's SSOSA. 4RP 52-53; CP 72-91. The Court reasoned:

So I feel somewhat of a cognitive disconnect between what Dr. Lennon is saying with what reality is. Dr. Lennon is saying he thinks he has made remarkable progress in the two months since he got out from jail. But they weren't -- but the very first polygraph that they had him tested for showed deception, and showed deception on the same issues.

. . .
I just find there is just too great a risk. He has been in the program longer than anybody and, while there might be some issues that would lead the Court to believe that they could continue . . . that doesn't jibe . . . I cant trust him in the community. So I'm revoking the SSOSA.

4RP 54-56.

C. ARGUMENT

THE COURT'S DECISION TO REVOKE EMMERMANIS' SSOSA WAS AN ABUSE OF DISCRETION.

A trial court may revoke a SSOSA "if [it] is reasonably satisfied that an offender has violated a condition of his suspended sentence." State v. Dahl, 139 Wn.2d 678, 683, 990 P.2d 396 (1999). After revoking a SSOSA, a sentencing court reinstates the suspended sentence. RCW 9.94A.670(10).

Revocation of a suspended sentence rests within the discretion of the court. See, State v. Kuhn, 81 Wn.2d 648, 650, 503 P.2d 1061 (1972). It is an abuse of discretion "when the trial court's decision is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons." State v. Blackwell, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). A decision is "manifestly unreasonable" if the court, despite applying the correct legal standard to the supported facts, adopts a view "that no reasonable person would take," State v. Lewis, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990), and arrives at a decision "outside the range of acceptable choices." State v. Rundquist, 79 Wn. App. 786, 793, 905 P.2d 922 (1995). The "untenable grounds" analysis addresses the factual determinations underlying the decision. State v. Rohrich, 149 Wn.2d 647, 654, 71 P.3d 638 (2003). With regard to the question of whether the verified facts support the court's exercise of discretion, the abuse of discretion standard considers a balance:

Whether this discretion is based on untenable grounds, or is manifestly unreasonable, or is arbitrarily exercised, depends upon the comparative and compelling public or private interest of those affected by the order or decision and the comparative weight of the reasons for and against the decision one way or the other.

State ex re. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

Here, the court abused its discretion when it revoked the SSOSA because its decision was contrary to the evidence. The Department of Corrections alleged only that Emmermanis failed to make reasonable progress since February 7, 2008. 4RP 40, 45; CP 74-75. The only evidence that directly addressed Emmermanis' progress was Dr. Lennon's testimony. Dr. Lennon testified since February, 2008, Emmermanis made "more than

reasonable progress." 4RP 17. Dr. Lennon also stated that he had seen very positive changes. 4RP 26.

There was one issue before the court: whether or not Emmermanis had made reasonable progress since February 7, 2008. The Court's finding that Emmermanis had not made reasonable progress directly contradicts Dr. Lennon's testimony. Because the court's finding contradicts the only evidence related to Emmermanis' treatment between February 7, 2008 and the date of the revocation hearing, the finding is arbitrary and manifestly unreasonable. The court's decision to revoke the SSOSA was, therefore, an abuse of discretion.

D. CONCLUSION

For the above reason, this Court should reverse the trial court's decision revoking Emmermanis' SSOSA.

DATED this _____ day of December, 2008.

Respectfully submitted,

NIELSEN, BROMAN & KOCH, PLLC

ERIC J. NIELSEN
WSBA No. 12773
Office ID No. 91051

Attorneys for Appellant